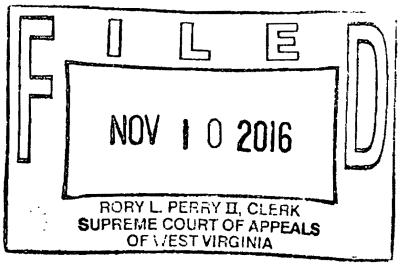
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 16-0543



STATE OF WEST VIRGINIA,

Petitioner,

v.

STEWARD BUTLER,

Respondent.

BRIEF OF THE WEST VIRGINIA ATTORNEY GENERAL AS *AMICUS CURIAE* AS OF RIGHT

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QUESTION PRESENTED

West Virginia Code § 61-6-21(b) makes it a felony to injure a person "because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex."

The question presented in this case is whether this criminal statute applies to an injury committed because of another person's sexual orientation.

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This appeal is about the separation of powers. The prosecuting attorney of Cabell County asks this Court to extend the criminal penalties of Section 61-6-21(b) to actions committed because of the victim's sexual orientation. But the Legislature did not include the phrase "sexual orientation" among the list of characteristics that trigger criminal responsibility under Section 61-6-21(b). And it has refused to do so repeatedly—against the backdrop of numerous similar statutes across the country in which "sex" and "sexual orientation" are listed separately, and the long-standing common and dictionary understanding that "sex" and "sexual orientation" are different terms. That is the constitutional prerogative of the Legislature, and it must be respected.

This appeal is also about fair notice in criminal statutes. It is a bedrock principle of our criminal justice system that criminal statutes must speak clearly and give the public fair notice of precisely what conduct is prohibited. The prosecuting attorney seeks to turn that principle on its head. He concedes that the statute plainly speaks only to "sex" and not "sexual orientation," but asserts that because he believes it to be "*ambiguous* with regard to this case," Pet. Br. 14, the statute should be read broadly. That is exactly backwards, and runs contrary to controlling precedent in this Court and every other court in the nation. Even if the prosecuting attorney is correct that there is ambiguity in the law, due process and the rule of lenity require that any ambiguity in a criminal statute must be construed narrowly and against the State.

As the State's chief legal officer, the Attorney General files this *amicus* brief as of right to assert the Attorney General's view of the law because he believes that the prosecuting attorney has advanced an improperly broad understanding of Section 61-6-21 that violates both the separation of powers and principles of due process. W. Va. R. App. P. 30(a). The Attorney General's view of Section 61-6-21(b) is that the statute means what it says—it applies to sex, and not sexual orientation—and whether to expand the scope of the statute is not within the powers of the Attorney General, the prosecuting attorney, or this Court. As this Court has recognized, the need for presentment of the Attorney General's views is particularly important "where the interest of the State or a State entity is at issue" and where "the Attorney General takes a different view of matters before a tribunal than the State entity," as here. Syl. Pt. 7, in part, *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 26, 41 & n.27, 569 S.E.2d 99, 102 & n.27 (2002);

The Attorney General in no way condones the alleged conduct or motivations of the defendant, who remains under indictment on charges of battery and will be judged accordingly in the circuit court below. But that is not what this appeal is about. This appeal is about respecting the Legislature's prerogative to make policy judgments in criminal statutes, and about the longstanding understanding in this country that criminal statutes should be strictly construed to give fair notice to the public.

SUMMARY OF ARGUMENT

The circuit court correctly held that Section 61-6-21(b) applies to injuries committed because of a person's *sex* and not to injuries committed because of a person's *sexual orientation.*

I. Section 61-6-21(b) is unambiguous. The Legislature included "sex" among the characteristics that trigger criminal responsibility but did not include the phrase "sexual orientation." And there is strong evidence that the Legislature's omission of the latter was intentional and must be given meaning. To begin with, in a wide array of dictionaries and in

common parlance, the words "sex" and "sexual orientation" refer to different concepts. Moreover, the Legislature has repeatedly refused to add the word "sexual orientation," even though the federal government and 30 other states list both "sex" and "sexual orientation" separately in their hate-crimes statutes.

II. In their briefs, the prosecuting attorney of Cabell County and his *amicus* do not and cannot show that the circuit court erred when it held that Section 61-6-21(b) applies to sex and not to sexual orientation. Nothing they advance—either from a federal agency opinion or from their fundamental public policy disagreement with the statute's limited reach—can overcome the simple limits of Section 61-6-21(b)'s text. The text says sex, not sexual orientation, and the legislature intended a narrow definition of sex, one that did not include sexual orientation.

At its heart, therefore, this appeal requires this Court to be faithful to the core principle of the democratic process: that it is for the people—not the courts or a prosecutor—to decide through their elected legislators whether to make it a felony to injure another person because of the other person's sexual orientation. Here, the legislature has not, however, extended felony liability to these injuries, and thus it is not for this Court to do so judicially by conflating the term sex with the term sexual orientation.

The decision below should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because this case presents a straightforward application of unambiguous statutory text. If this Court desires oral argument, Rule 20 argument would be appropriate, and the Attorney General respectfully requests an opportunity to participate.

ARGUMENT

I. The circuit court correctly held that Section 61-6-21(b) applies to injuries committed because of another person's *sex* and not to injuries committed because of another person's *sexual orientation*.

A. The plain meaning of the statutory term "sex" does not include "sexual orientation."

As in any case of statutory interpretation, this Court's first task is to "determine whether the language at issue is ambiguous." *Bd. of Trs. of Firemen's Pension & Relief Fund of Fairmont v. City of Fairmont*, 215 W. Va. 366, 370, 599 S.E.2d 789, 793 (2004). If "the statutory text is clear," this Court "must apply the statute according to its literal terms," and "presume that a legislature says in a statute what it means and means in a statute what it says there." *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 532-33, 782 S.E.2d 223, 227-28 (2016) (quotation omitted). When a statute is unambiguous, there is no room for the Court to examine any "public policy ramifications potentially resulting from its application or to comment upon the wisdom of the legislation." *Id.* at 533, 782 S.E.2d at 228; *see* App. 13.

A statute is ambiguous only where it "is susceptible of two *reasonable* constructions." *Firemen's Pension & Relief Fund*, 215 W. Va. at 370, 599 S.E.2d at 793 (emphasis added). Ambiguity does not arise simply because "different interpretations are conceivable," *State v. Chapman*, No. 13-0111, 2013 WL 5676630, at *4 (W. Va. Oct. 18, 2013) (quotations omitted), or the "parties disagree about the meaning of a statute," *T. Weston, Inc. v. Mineral Cnty.*, 219 W. Va. 564, 568, 638 S.E.2d 167, 171 (2006) (citation omitted). The question is not whether there is "[m]ere informality in phraseology or clumsiness of expression," but rather "if the language imports one meaning or intention *with reasonable certainty*." *Jessee v. Aycoth*, 202 W. Va. 215, 218, 503 S.E.2d 528, 531 (1998) (quotation omitted) (emphasis added).

In this case, Section 61-6-21(b) is unambiguous because "the language imports . . . with reasonable certainty" that the statute applies only to injuries committed because of an individual's sex, and not because of an individual's sexual orientation. *Jessee*, 202 W. Va. at 218, 503 S.E.2d at 531. Passed and signed into law in 1987, Section 61-6-21(b) makes it a felony to injure a person because of several of the victim's characteristics, including "because of such other person's . . . sex." W. Va. Code § 61-6-21(b).[1] The statute does not list sexual orientation as a triggering characteristic. For several reasons explained more fully below, that omission is clear evidence that the Legislature did not intend for this criminal statute to apply to sexual orientation.

1. Dictionary definitions show that "sex" and "sexual orientation" are different terms.

In a wide array of dictionaries and in common parlance, the words "sex" and "sexual orientation" refer to different concepts, which strongly suggests that the Legislature's omission of the latter was intentional and must be given meaning. As this Court has said, "[u]ndefined words and terms in a legislative enactment will be given their common, ordinary and accepted meaning." *State v. Soustek*, 233 W. Va. 422, 426, 758 S.E.2d 775, 779 (2014) (looking to definitions from *Merriam Webster* and *Black's Law Dictionary*). And furthermore, "[t]he

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[1] In full, Section 61-6-21(b) reads:

> If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, he or she shall be guilty of a felony, and, upon conviction, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

W. Va. Code § 61-6-21(b).

expressio unius maxim is premised upon an assumption that certain omissions from a statute by the Legislature are intentional." *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 492, 647 S.E.2d 920, 928 (2007).

The word "sex" refers to whether a person is male or female. For decades, Black's Law Dictionary has defined "sex" as "the sum of the peculiarities of structure and function that distinguish a male from a female organism," or more simply, "the character of being male or female," Sex, Black's Law Dictionary 1541 (4th ed. rev. 1968); *see also* Sex, *Black's* Law Dictionary (10th ed. 2014) ("The sum of the peculiarities of structure and function that distinguish a male from a female organism; gender."). The Oxford English Dictionary likewise has defined "sex" as "[e]ither of the two divisions of organic beings distinguished as male and female, respectively," determined by "those differences in the structure and function of the reproductive organs." Sex, Oxford English Dictionary 107 (2d ed. 2000). The verb to "sex" is thus "to determine the sex of, by anatomical examination; to label male or female." Sex, Oxford English Dictionary 110 (2d ed. 2000). The American Psychological Association agrees as well that "sex" means the "physical and biological traits" "that distinguish between males and females." Sex, American Psychological Association, Dictionary of Psychology 843 (1997). Sex is also defined by Webster's Third New International Dictionary as "the two divisions of . . . human beings respectively designated male or female," which is usually "genetically controlled and associated with special sex chromosomes . . . ." Sex, 9 Webster's Third New International Dictionary 2081 (1971).[2] Thus, when parents say that an ultrasound revealed a baby's sex, for example, they mean that an ultrasound revealed whether the baby is a boy or a girl.

[2] The prosecuting attorney concedes that other definitions of the word sex, such as sexual intercourse or sexual relations, do not apply here. Pet. Br. 14-15.

In contrast, "sexual orientation" refers to the direction of a person's sexual attraction, *e.g.*, whether a person is attracted to males, females, or both. Black's Law Dictionary defines sexual orientation as a "person's predisposition or inclination toward sexual activity or behavior with other males or females," specifically, a person's "heterosexuality, homosexuality, or bisexuality." Sexual Orientation, Black's Law Dictionary (10th ed. 2014). The American Psychological Association, likewise, defines "sexual orientation" as "one's enduring sexual attraction to male partners, female partners, or both." Sexual Orientation, American Psychological Association, Dictionary of Psychology 847 (1997). And the Webster's New College Dictionary defines "sexual orientation" as "[t]he direction of one's sexual interest toward members of the same, opposite, or both sexes." Sexual Orientation, Webster's New College Dictionary 1013 (1995). Sexual orientation is not a subset of sex, *see* Amic. Br. 14-15, but a different category altogether. Thus, no one would think that when a parent says that an ultrasound revealed the baby's "sex," that the ultrasound revealed whether the baby is attracted to men, women, or both.

2. Legislative and judicial activity in West Virginia confirm the understanding that "sex" and "sexual orientation" are different terms.

Both the courts and the Legislature in West Virginia have acted consistently with the understanding that "sex" and "sexual orientation" are different terms. No state or federal court in West Virginia has ever been confronted with the novel idea that Section 61-6-21(b) applies to a case involving the alleged infliction of injury because of the victim's sexual orientation.[3] Indeed,

[3] No federal Section 61-6-21(b) case has presented this question. *E.g.*, *Estate of Jones ex rel. Jones v. City of Martinsburg*, No. 3:13-CV-68, 2014 WL 2094225, at *5 (N.D. W. Va. May 20, 2014) (alleging a Fourth Amendment violation); *Camastro v. City of Wheeling*, No. CIV.A. 5:06CV69, 2007 WL 3125251, at *2 (N.D. W. Va. Oct. 24, 2007) (alleging political retaliation); *Kearns v. Timmiah*, No. CIV.A. 5:06-CV-105, 2007 WL 2220506, at *1-2 (N.D. W. Va. Aug. 2, 2007) (alleging discrimination against a Muslim).

there have been specific instances where charges apparently were not brought under Section 61-6-21(b) for an assault based on perceived sexual orientation. In 2001, a man perceived to be gay was beaten, but charges under Section 61-6-21(b) were inapplicable because "[i]n West Virginia and many other states, sexual orientation is not included in hate crime legislation." *W. Va. still excluding gays from hate crimes*, CHARLESTON GAZETTE, 2001 WLNR 773876 (Dec. 27, 2001). Relatedly, this Court's rules list "sex" and "sexual orientation" as separately prohibited grounds for bias or harassment, further reflecting a recognition in the judiciary that the terms are distinct.[4]

For its part, the Legislature has repeatedly debated and rejected attempts to "expand[] the state's hate crimes legislation to apply to attacks based on sexual orientation." Sam Trantum, *Hate crime bill dies House committee puts proposal on indefinite hold*, CHARLESTON GAZETTE & DAILY MAIL, Feb. 26, 2002, 2002 WLNR 1075860; *see also* Deanna Wrenn, *Hate crimes bills subject of hearing*, CHARLESTON GAZETTE & DAILY MAIL, Feb. 22, 2003, 2003 WLNR 1634216 (reporting on the consideration of four bills that "would add sexual orientation and disability to the list of protected classes under current hate crime laws"). At least 26 bills have been proposed since 1993 to amend Section 61-6-21(b) to add sexual orientation—and all have been rejected.[5]

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[4] W. Va. Trial Ct. R, 4.06 (forbidding bias about "*gender*, race, ethnicity, religion, handicap, age, and *sexual orientation*") (emphases added); W. Va. Code Jud. Conduct Canon 2.3 (prohibiting harassment based upon "race, *sex,* gender, religion, national origin, ethnicity, disability, age, *sexual orientation,* marital status, socioeconomic status, or political affiliation") (emphases added); *id.* (prohibiting harassment "based upon . . . race, *sex,* gender, religion, national origin, ethnicity, disability, age, *sexual orientation,* marital status, socioeconomic status, or political affiliation") (emphases added); *id.* at 3.6 (forbidding judges to join groups that discriminate "on the basis of race, *sex*, gender, religion, national origin, ethnicity, or *sexual orientation*") (emphases added); W. Va. R. of Prof'l Conduct Rule 8.4, Comment 3 (forbidding "prejudice based upon race, *sex*, religion, national origin, disability, age, *sexual orientation* or socioeconomic status") (emphases added).

[5] H.B. 2851 (2008); H.B. 2851 (2007); H.B. 2225 (2006); H.B. 2442 (2006); H.B. 2225 (2005); H.B. 2442 (2005); H.B. 2004 (2003); H.B. 2042 (2003); H.B. 2226 (2003); H.B. 3147 (2003); H.B. 4464 (2002); S. 23 (2001); H.B. 2354 (2001); H.B. 2415 (2001); S. 422 (2000); H.B. 4392

To be sure, courts must be cautious in reading too much into "[t]he failure of the legislature to enact a particular law." *Local 598, Council 58 Am. Fed'n v. City of Huntington*, 173 W. Va. 403, 405, 317 S.E.2d 167, 168 (1984). But where the same or similar proposals have been made and rejected more than two dozen times, as here, the intent of the Legislature is more than clear. *See, e.g.*, *Heckler v. Day*, 467 U.S. 104, 118 n.30 (1984) (describing fact that "Congress has rejected repeated demands for mandatory deadlines" as a "clear . . . expression of congressional intent"); *State v. Gen. Paving Co.*, 590 F.2d 680, 683 (7th Cir. 1979) (giving weight to "the repeated refusals of Congress to enact the suggested provision").

3. Similar criminal laws at the federal level and in other states reflect a uniform understanding that "sex" and "sexual orientation" are different terms.

Finally, a review of similar hate-crime laws at both the federal and state level also reveal a consistent understanding across the country that "sex" and "sexual orientation" are different terms. When Congress created criminal liability for injuries committed because of sex or sexual orientation, it did so listing each category separately. *See* 18 U.S.C. § 249(2) (making it a felony to willfully cause or attempt to cause "bodily injury to any person, because of the actual or perceived religion, national origin, *gender*, *sexual orientation*, *gender identity*, or disability of any person) (emphases added). Likewise, in 30 states that provide heightened criminal liability for injuries committed because of certain characteristics of the victim, each statute expressly lists "sexual orientation" as a separate ground from "sex" or "gender."[6] In many of these states, the

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(2000); H.B. 2114 (1999); H.B. 2481 (1998); S.B. 495 (1997); H.B. 2481 (1997); S. 457 (1996); H.B. 2775 (1995); S. 478 (1994); H.B. 4385 (1994); S. 319 (1993); H.B. 2426 (1993).

[6] Ariz. Rev. Stat. §§ 41-1750, 13-701(D)(15); Cal. Penal Code §§ 422.55; Colo. Rev. Stat. § 18-9-121; Conn. Gen. Stat. §§ 53a-181j; Del. Code tit. 11, § 1304; Fla. Stat. § 775.085; Haw. Rev. Stat. §§ 706-662, 846-51; 720 Ill. Comp. Stat. 5/12-7.1; Iowa Code §§ 729a.1-2;; Ky. Rev. Stat. § 532.031; La. Rev. Stat. § 14:107.2; Me. Rev. Stat. tit. 17-A, § 1151; Md. Code, Crim. Law §§ 10-301 to -306; Mass. Gen. Laws ch. 265, § 39; Minn. Stat. §609.2231(4); Mo. Rev. Stat. §

term "sexual orientation" was added by amendment to a statute that already imposed criminal liability for the infliction of injury because of an individual's "sex."

It also appears that no state or federal court has ever interpreted the word "sex" in a hate-crimes statute to apply to an injury inflicted because of a victim's sexual orientation. In addition to West Virginia, there are 5 other states that list in their hate-crimes statutes "sex" but not "sexual orientation" as a basis for imposing heightened criminal liability.[7] A further 11 states list neither sex nor sexual orientation.[8] To the Attorney General's knowledge, no court interpreting those laws has ever held that the omission of the phrase "sexual orientation" can be overcome by a broad reading of the term "sex." *Cf. Columbus v. Spingola*, 144 Ohio App. 3d 76, 81, 759 N.E.2d 473, 477 (2001) (The Ohio "statute is silent on sexual orientation."); *United States v. Hill*, No. 3:16-CR-00009, 2016 WL 1650767, at *1 (E.D. Va. Apr. 22, 2016) ("Virginia's hate crime statute does not cover crimes based on sexual orientation").

B. Even if the statutory term "sex" were ambiguous, the rule of lenity and the constitutional principles of due process would require construing the term narrowly.

For all the reasons explained above, the Legislature's exclusion of "sexual orientation" from Section 61-6-21(b) is clearly an intentional policy judgment that this Court may not and

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557.035; Neb. Rev. Stat. § 28-111,-113; Nev. Rev. Stat § 41.690; N.H. Rev. Stat. § 651:6; N.J. Stat. § 2c:16-1; N.M. Stat. §§ 31-18B2, -3; N.Y. Penal Law § 485-05; Or. Rev. Stat. § 166.155; R.I. Gen. Laws § 12-19-38; Tenn. Code § 40-35-114(17); Tex. Penal Code § 12.47, Tex. Code Crim. Proc. Art. 42.014; Vt. Stat. tit. 13, § 1455; Wash. Rev. Code § 9A.36.080; Wis. Stat. § 939.645; *see also* D.C. Code §§ 22-3701, 3702, 3704.

[7] Mich. Comp. Laws § 750.147b; Miss. Code §§ 99-19-301 to 99-19-307; N.D. Cent. Code § 12.1-14-04; Utah Code § 76-3-203.3, 76-3-203.4 (no categories listed); W. Va. Code § 61-6-21.

[8] Ala. Code § 13A-5-13; Alaska Stat. § 11.76.110; Idaho Code §§ 18-7901, 7902; Mont. Code Ann. §§ 45-5-221, 45-5-222; N.C. Gen. Stat. §§ 14-3, 14-401.14; Ohio Rev. Stat. § 2927.12; Okla. Stat. tit. 21, § 850; 18 Pa. Cons. Stat. § 2710; S.D. Codified Laws § 22-19B-1; Va. Code § 18.2-57. One state lists no specific categories. Utah Code § 76-3-203.3, 76-3-203.4. Five states (Arkansas, Georgia, Indiana, South Carolina and Wyoming) do not have hate crimes laws.

should not ignore. By its plain terms and in light of every similar criminal statute in the country, it is "reasonabl[y] certain[]" that the Legislature intended Section 61-6-21(b) to be applied to injuries committed because a person is male or female, but not injuries committed because a person is attracted to men or women. *Jessee*, 202 W. Va. at 218, 503 S.E.2d at 531. "It is not for this Court arbitrarily to read into [the] statute that which it does not say." Syl. Pt. 11, *Brooke B. v. Ray*, 230 W.Va. 355, 357, 738 S.E.2d 21, 24 (2013). "Just as courts are not to eliminate through judicial interpretation words that were purposely included," courts "are obliged not to add to statutes something the Legislature purposely omitted." *Id.*

But even were Section 61-6-21(b) ambiguous, the rule of lenity and the constitutional requirements of due process would still require this Court not to extend the term "sex" in this criminal statute to include "sexual orientation." The rule of lenity provides that if "a criminal statute contains ambiguous language," *State v. Davis*, 229 W. Va. 695, 699, 735 S.E.2d 570, 574 (2012), the court must read the language "against the State and in favor of the defendant," Syl. Pt. 5, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 259, 465 S.E.2d 257, 259 (1995). This strict rule ensures: "fair warning of the boundaries of criminal conduct"; "that legislatures, not courts, define criminal liability"; and that "expansive judicial interpretations" do not "create penalties for offenses that were not intended by the legislature." *Id.* at 262, 465 S.E.2d at 262 (quotation omitted).

Likewise, under the federal and state constitutional requirements of due process, this Court may not "apply[] a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). All criminal offenses "must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is

prohibited by statute and to provide adequate standards for adjudication." Syl. Pt. 3, *State v. Sulick*, 232 W. Va. 717,718, 753 S.E.2d 875, 876 (2012) (quotation omitted). A criminal statute must tell a potential offender *exactly* "what he should avoid doing." *Id.* at 723, 753 S.E.2d at 881. If it does not, it not only may not be applied against the accused in particular case, but is entirely void for vagueness. *See State ex rel. Morgan*, 195 W. Va. at 262-63, 465 S.E.2d at 262-63.[9]

Here, these principles require this Court to resolve any doubt about the meaning of "sex" in Section 61-2-21 against applying the statute to injuries inflicted because of a victim's "sexual orientation." As the discussion above shows, the word "sex" has never been understood in any hate-crimes statute to extend to crimes committed because of a person's "sexual orientation." There is no serious argument that the public has had fair warning that sexual orientation falls under the term "sex" in Section 61-2-21, and adding it by judicial fiat would "offend due process notions of fundamental fairness and render the statute impermissibly vague." *State v. Louk*, 237 W. Va. 200, 786 S.E.2d 219, 225 (2016).

II. The prosecuting attorney of Cabell County offers no persuasive reason for this Court to extend Section 61-6-21(b) to crimes committed because of an individual's "sexual orientation."

A. Alleged ambiguity is not a lawful basis for reading a criminal statute broadly.

Conceding that "the language of §61-6-21 is unquestionably *plain*," the prosecuting attorney of Cabell County argues that the statute "nonetheless" should be extended here because it is *"ambiguous* with regard to this case." Pet. Br. 14. The prosecuting attorney admits, as he must, that the statutory language punishes injuries inflicted because of "sex" and other

[9] Indeed, were a court to broadly interpret a criminal law to cover something new, it would also raise state and federal ex post facto concerns. Syl. Pt. 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 292, 262 S.E.2d 885, 885 (1980).

characteristics, but does not include "sexual orientation" in that list. Nevertheless, he urges that the statute should be extended to acts "based solely upon [an] individual's sexual orientation" because, in his view, the word sex could "encompass multiple meanings." *Id.* at 7, 15.

To begin with, the alleged ambiguity does not exist. As discussed above, "sex" and "sexual orientation" have long and consistently been understood as different, non-overlapping terms in dictionaries, in ordinary parlance, and in similar criminal statutes at the federal and state levels. Sex-based injuries mean people targeting women for being women or men for being men. Sexual orientation injuries occur because of a person's sexual inclinations or activity.

The prosecuting attorney urges that a few dictionary definitions of "sex" could be contorted to cover "sexually motivated phenomena or behavior." *Id.* at 15. But as this Court and the United States Supreme Court have explained, ambiguity does not arise simply because "different interpretations are conceivable." *Chapman*, 2013 WL 5676630, at *4 (quotations omitted); *see also Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context . . . ."). The question is whether "the language imports one meaning or intention with reasonable certainty.'" *Jessee*, 202 W. Va. at 218, 503 S.E.2d at 531. And the prosecuting attorney has not pointed to *any authority* supporting his view that the word "sex" in a hate-crimes statute should be read expansively to cover crimes based on sexual orientation.

More important, the prosecutor's reliance on alleged *ambiguity* is alone fatal. As also discussed above, the rule of lenity and constitutional principles of due process foreclose the application of an ambiguous criminal statute. This Court has made very clear that a "criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute." *State v. Louk*, 237 W. Va. 200,

786 S.E.2d 219, 225 (W. Va. 2016). If a criminal statute like Section 61-6-21 is ambiguous, that ambiguity must be construed "against the State and in favor of the defendant." Syl. Pt. 5, *State ex rel. Morgan*, 195 W. Va. at 259, 465 S.E.2d at 259. Thus, for his interpretation of the statute to apply, the prosecuting attorney must not merely show an ambiguity in the law but must prove that his view of the law is the *only* reasonable reading. By his own admission, he does not and cannot do so.

B. Trial court cases and an agency opinion concerning remedial civil statutes do not provide a reason to expand West Virginia's hate-crimes statute.

Unable to point to any federal or state case law on point, the prosecuting attorney (and his *amicus curiae*) turn instead to a number of remedial civil statutes for support, including the West Virginia Human Rights Act and Title VII of the federal Civil Rights Act. Pet. Br. 15-26; Amic. Br. 4-5, 6-7, 8-12. But this gambit fails for several reasons.

1. Remedial civil statutes are interpreted broadly while penal statutes, like Section 61-6-21, are interpreted narrowly.

Foremost, penal and remedial statutes are construed in exactly *opposite* ways. As already noted, it has long been held that criminal and penal statutes must be strictly construed. *See, e.g.*, *State v. George K.*, 233 W.Va. 698, 706, 760 S.E.2d 512, 520 (2014); Syl., *Clear Fork Coal Co. v. Anchor Coal Co.*, 105 W. Va. 570, 570, 144 S.E. 409, 409 (1928). In sharp contrast, it is well-settled that remedial statutes are to be broadly and liberally construed. *See, e.g.*, *Sole v. Kindelberger*, 91 W. Va. 603, 114 S.E. 151, 153 (1922).

Cases interpreting civil remedial statutes, like the West Virginia Human Rights Act or Title VII, are thus wholly inapposite for purposes of interpreting a criminal and penal statute, like Section 61-6-21. This Court has expressly held that the West Virginia Human Rights Act is a remedial statute that "should be liberally construed to advance [its] beneficent purposes." *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 64, 479 S.E.2d 561, 574 (1996). So, too, have

federal courts held that "Title VII should be liberally construed in light of its remedial purpose." *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 409 (4th Cir. 2015). Whatever might be said about the meaning of the word "sex" in those broadly construed statutes cannot be applied to the word "sex" in Section 61-6-21, a statute that must strictly and narrowly construed against the State. They are apples and oranges.

2. No controlling appellate decisions interpret the word "sex" in any of the civil statutes to extend to sexual orientation.

Even if cases interpreting remedial civil statutes could be applied to a criminal statute, like Section 61-6-21, there are no controlling appellate decisions that support the prosecuting attorney's argument that "sex" should be construed broadly to encompass sexual orientation.

a. No state or federal court, much less any appellate court, has held that the civil prohibition on sex discrimination in the West Virginia Human Rights Act, W. Va. Code § 5-11-6, or other West Virginia civil laws includes sexual-orientation discrimination. As the prosecutor admits, "[t]his Court has never directly addressed whether sexual orientation discrimination is actionable under the WVHRA." Pet. Br. 16. This Court has held, however, that a sexual-orientation discrimination claim under the WVHRA is *not* the same as one for sex discrimination. In *Minshall v. Health Care & Retirement Corporation of America*, 208 W. Va. 4 537 S.E.2d 320 (W. Va. 2000), a plaintiff brought a claim for sexual-orientation discrimination, but on appeal tried to repackage the claim as one for gender discrimination. *Id.* at 7, 537 S.E.2d at 323. Explaining that the plaintiff's original claim for sexual orientation discrimination was different in kind from "a claim for pure gender discrimination," this Court refused to consider the latter for the first time on appeal, deeming it unpreserved below. *Id.* Furthermore, in a case cited by the prosecutor himself, the only federal court to consider whether the WVHRA applies to sexual orientation has determined that "West Virginia would not recognize such a cause of

action." *Wamsley v. Lab Corp.*, No. CIV.A. 1:07-CV-43, 2007 WL 2819632, at *1 (N.D. W. Va. Sept. 26, 2007).

These cases are consistent with other available authorities and evidence of legislative intent. A leading treatise on employment discrimination states: "West Virginia has no law prohibiting employment discrimination on the basis of sexual orientation or sexual preference." 2 Castagnera, *et al.*, Termination of Employment § 52:5 (2016). And just as with Section 61-6-21(b), the West Virginia Legislature has rejected dozens of proposals to add sexual orientation to civil laws in West Virginia that prohibit discrimination.[10]

Absent favorable authority in West Virginia, the prosecuting attorney asserts that "sexual orientation discrimination is actionable in [the civil laws] in other [state] jurisdictions." Pet. Br. 18. But the *only* case he cites is an 18-year-old decision from the intermediate court of appeals of Oregon that has been superseded by statute. In *Tanner v. Oregon Health Sciences University*, 157 Or. App. 502, 971 P.2d 435 (Ore. App. 1998), the court found that the term "sex" can be construed widely or narrowly and it decided, without any textual or historical analysis, to use the broad definition. *Id.* at 515, 971 P.2d at 442. But since that decision, the Oregon legislature has amended the statute to include both "sex" and "sexual orientation" as prohibited bases for discrimination. *See* Or. Rev. Stat. § 659A.030.

b. Legal authority on the meaning of the word "sex" in Title VII is similarly unhelpful to the prosecuting attorney's position. Every federal appellate court to address a sexual-orientation

[10] S. 111 (2016); S. 518 (2016); H.B. 4404 (2016); S. 125 (2015); H.B. 2534 (2015); H.B. 2896 (2015); S. 472 (2014); S. 486 (2013); H.B. 2856 (2013); S. 14 (2012); H.B. 2045 (2012); S. 226 (2012); H.B. 2045 (2011); S. 154 (2010); H.B. 2454 (2010); S. 238 (2009); S. 134 (2009); H.B. 2454 (2009); H.B. 2925 (2009); H.B. 3211 (2008); S. 686 (2007); H.B. 2860 (2007); H.B. 3211 (2007); H.B. 2470 (2006); H.B. 2470 (2005); H.B. 2474 (2003); H.B. 3148 (2003); H.B. 2382 (2001); H.B. 2110 (1999); H.B. 2505 (1998); S. 369 (1997); H.B. 2505 (1997); S. 320 (1993).

discrimination claim under Title VII has found that the statute does not recognize such a claim.[11] As these courts have explained, "Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation." *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000). "The phrase in Title VII prohibiting discrimination based on sex means that it is unlawful to discriminate against women because they are women and against men because they are men." *Id.* (internal quotations omitted). Though "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw," *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009), the federal appellate courts have uniformly recognized that such a line exists. These courts relied, as

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[11] *E.g.*, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (It is "settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) ("The law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of sexual orientation."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 260-61 (3d Cir. 2001) (affirming that "Title VII provides no protection from discrimination on the basis of sexual orientation."); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751 (4th Cir. 1996) ("Title VII does not prohibit conduct based on the employee's sexual orientation."); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII"); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) ("[A] gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII."); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) (rejecting requests to "judicially amend Title VII to provide for such a cause of action" because it "is wholly inappropriate, as well as constituting a clear violation of the separation of powers, for this court, or any other federal court, to fashion causes of action out of whole cloth, regardless of any perceived public policy benefit"); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979), *abrogated on other grounds by Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001) ("Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."); *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections . . . do not extend to harassment due to a person's sexuality."); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997) ("We do not hold that discrimination because of sexual orientation is actionable."); *U.S. Dep't of Hous. & Urban Dev. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992) (assuming that "Title VII does not cover sexual orientation"); *see also Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 700-02, 706 (7th Cir. 2016) (rehearing en banc granted and opinion vacated).

well, on Congress's repeated rejection of proposals to add sexual orientation to Title VII.[12] As one federal appellate court explained, "[a]lthough congressional inaction subsequent to the enactment of a statute is not always a helpful guide, Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation." *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000). Thus, both the prosecutor and his *amicus* are forced to acknowledge that "[d]iscrimination on the basis of sexual orientation has not traditionally been actionable under Title VII." Pet. Br. 19; *see also* Amic. Br. 12 n.5.

These federal appellate courts also have distinguished non-actionable sexual orientation claims under Title VII from the sex stereotyping and same-sex harassment cases on which the prosecuting attorney relies. *See* Pet. Br. 16-17 (sex stereotyping), 17-18 (same-sex harassment). For example, in *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006), the appeals court rejected an attempt to advance a sexual-orientation claim (alleging "harassment based on [an individual's] perceived homosexuality") as a sex-stereotyping claim ("based on gender non-conformity"). *Id.* at 763. Sex stereotyping cannot be used to "bootstrap protection for sexual orientation into Title VII," explained another court, "because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." *Simonton*, 232 F.3d at 38. As for the same-sex harassment cases, they are not a basis for extending Title VII

[12] *E.g.*, H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013); H.R. 1397, 112th Cong. (2011); S. 811, 112th Cong. (2011); H.R. 3017, 111th Cong. (2009); H.R. 2981, 111th Cong. (2009); S. 1584, 111th Cong. (2009); H.R. 2015, 110th Cong. (2007); H.R. 3685, 110th Cong. (2007); S. 16, 108th Cong. (2003); H.R. 3285, 108th Cong. (2003); S. 1705, 108th Cong. (2003); S. 1284, 107th Cong. (2002); H.R. 2692, 107th Cong. (2001); S. 19, 107th Cong. (2001); H.R. 2355, 106th Cong. (1999); S. 1276, 106th Cong. (1999); H.R. 1858, 105th Cong. (1997); S. 869, 105th Cong. (1997); H.R. 1863, 104th Cong. (1995); S. 932, 104th Cong. (1995); S. 2056, 104th Cong. (1995); H.R. 4636, 103rd Cong. (1994); S. 2238, 103rd Cong. (1994); *Ulane,* 742 F.2d at 1085 n. 11 (collecting bills between 1975 and 1982).

to sexual orientation claims because "[t]he reality is that there is a distinction between one's sex and one's sexuality under Title VII." *Hamner*, 224 F.3d at 707. The same-sex harassment cases allow claims alleging discrimination "because [the plaintiff] was a man," but not "because of his sexual orientation." *Simonton*, 232 F.3d at 36.

Against these uniform and numerous federal appellate cases, the prosecuting attorney and his *amicus* offer only a handful of federal district court cases, Pet. Br. 24; Amic. Br. 5, and a 2015 guidance letter from the U.S. Equal Employment Opportunity Commission ("EEOC"), Pet. Br. 21-24 (citing *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015)). Neither is persuasive. The federal district court cases were not subjected to appellate review, and are often conclusory in their assertions. *See, e.g.*, *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) ("The protections of Title VII are not limited to heterosexual employees only."). Similarly, the opinion of the EEOC conflicts with the uniform body of federal appellate case law, is contrary to EEOC's own position from as recent as 2014 (*see* Pet. Br. 21-22), and has never been accepted by any appellate court.

c. Finally, there is no merit to *amicus*'s reliance on cases that find actions taken because of an individual's interracial associations to have been taken "because of" that individual's race. Amic. Br. 2, 6-12. Again, to the extent these cases involve broadly-construed remedial civil statutes, they can give no guidance to this Court's interpretation of a criminal statute like Section 61-6-21. *See supra* 14-15.

Moreover, this argument fails to recognize that laws protecting "race" have always been interpreted more broadly than laws protecting "sex," and that this historical context must inform this Court's understanding of the Legislature's intent in omitting the phrase "sexual orientation" from Section 61-6-21. Laws protecting "race" have always been read to prohibit any racism,

including discrimination based on an individual's interracial associations. *See W. Va. Human Rights Comm'n v. Wilson Estates, Inc.*, 202 W. Va. 152, 159, 503 S.E.2d 6, 13 (1998) (discussing precedents). There has never been a separate term or designation for "racial orientation." In contrast, "sex" and "sexual orientation" have historically been considered different concepts, as discussed at length above. *See supra* 4-10. As one court has said, the "novel theory that all associational sex discrimination is barred as the analogue of interracial relationship discrimination . . . proves too much and must be rejected." *Partners Healthcare Sys., Inc. v. Sullivan*, 497 F. Supp. 2d 29, 39 (D. Mass. 2007).

C. Policy disagreements do not provide this Court lawful grounds for extending Section 61-6-21 to crimes committed because of an individual's sexual orientation.

The prosecuting attorney's final argument is that "failure to apply West Virginia Code § 61-6-21 would lead to injustice." Pet. Br. 36. He urges this Court to interpret the statute in a way that would "further justice." *Id.* at 25.

But as explained above, *see supra* 4-10, the statutory text here is plain. And if "the statutory text is clear and unambiguous," this Court "must apply the statute according to its literal terms." *State ex rel. Biafore*, 236 W. Va. at 532, 782 S.E.2d at 227 (quotation omitted). There is no room to examine any "public policy ramifications potentially resulting from its application or to comment upon the wisdom of the legislation." *Id.* at 533, 782 S.E.2d at 228.

And if this Court determines the text to be ambiguous, then long-standing precedent of this Court and every other court in the nation makes clear that justice demands a narrow construction of the statute. That is the principle underlying the rule of lenity. *See United States v. Orellana*, 405 F.3d 360, 371 (5th Cir. 2005) ("The policy underlying the rule of lenity is that of fairness to the accused."); *United States v. Barnes*, 295 F.3d 1354, 1369 (D.C. Cir. 2002)

(Sentelle, J., dissenting) ("Fundamental to our fairness-centered criminal justice system is the rule of lenity for the interpretation of ambiguous penal statutes.").

The Attorney General in no way condones the actions of which the defendant has been accused or his alleged motivations. But it is not within the Attorney General's power, or the power of the prosecuting attorney or this Court, to decide whether to extend Section 61-6-21(b) to actions committed because of an individual's sexual orientation. That is within the authority and discretion of the Legislature, and it has chosen repeatedly not to add the phrase "sexual orientation" to Section 61-6-21(b). That decision must be respected.

In the end, it is apparent that the prosecuting attorney himself recognizes that what he seeks here is within the prerogative of the Legislature. He has said that he desires to "send[] a clear message" to the Legislature to "change the law to include sexual orientation." *Cabell prosecutor to appeal Butler ruling*, HUNTINGTON HERALD-DISPATCH, May 18, 2016, 2016 WLNR 15125244. In his notice of appeal to this Court, he wrote, "[e]ven if this Court were to decide that the Statute's protected class based on 'sex' does not also include such protection based on sexual orientation, the decision of West Virginia's highest court would effectively and lawfully emphasize to the Legislature this deficiency in the law." Notice of Appeal § 17 at 3.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 16-0543

STATE OF WEST VIRGINIA,

Petitioner,

v.

STEWARD BUTLER,

Respondent.

CERTIFICATE OF SERVICE

I, Julie Marie Blake, Assistant Attorney General and counsel for *Amicus Curiae*, verify that on November 10, 2016, I served a copy of the above brief upon all parties as indicated below by mail:

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